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ORIGINAL NEW APPLICATION

0000055134

BEFORE THE ARIZONA CORPORATION COMMISSION

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AZ CORP COMMISSION
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In the Matter of the Application of Level 3 Communications, LLC for a Limited Waiver Relating to Transfer of Control and Financing Transactions	Docket No. T-03654A-06-0356

Pursuant to AAC R14-2-806 and A.R.S. § 40-202.M., Level 3 Communications, LLC ("Level 3") petitions the Commission for a limited waiver of the provisions of the Affiliated Interests Rules (AAC R14-2-801 *et seq.*), A.R.S. § 40-285, and A.R.S. §§ 40-301 to -303, to streamline the administrative process by which Level 3 may complete transfer of control and financing transactions. For the reasons set forth below, Level 3 requests a waiver that would eliminate prior approval periods and permit Level 3, as a non-dominant, competitive carrier to complete transfer and financing transactions based on a modified notice procedure.

I. Background

Level 3 seeks this waiver to eliminate approval procedures that impose unnecessary and burdensome requirements on non-dominant, competitive carriers. Most of these requirements were established to address markets that are not subject to competition. In

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that market structure, extensive government and economic regulation of the utility was necessary to protect captive ratepayers and consumers of monopoly services. Where utilities do not face competition, wield control over bottleneck facilities or enjoy a dominant market share, it is important for the Commission to scrutinize the utilities' financial status and its business actions in order to safeguard consumers from a monopoly provider's potentially risky financial transactions and to ensure that rates and quality of service are not impaired. Although the telecommunications market has changed dramatically so that consumers may choose freely among non-dominant carriers offering competitive services, the same burdensome administrative procedures aimed at regulating transfer and financing transactions of dominant, monopoly utilities remain in place for non-dominant, competitive carriers.

II. In Today's Competitive Market, Burdensome Prior Approval Procedures for Non-dominant Carrier Transfers and Financings Do Not Serve the Public Interest

The public interest in a competitive environment does not require strict scrutiny of non-dominant carriers' business and financial operations. Burdensome pre-approval requirements for business transactions have become anachronisms in today's fast-paced competitive environment where new entrants risk capital to build and finance their operations with no guaranteed return.[1] Non-dominant carriers, such as Level 3, bear the risks of their own financial decisions and competitive market forces determine whether a

1 The FCC and the Commissions in California and Kentucky are just a few examples of regulatory agencies that have recognized the need to reform and reduce regulatory requirements to reflect competitive changes in the market. See *Implementation of Further Streamlining Measures for Domestic Section 214 Authorization,* CC Docket No. 01-150, FCC 02-78, Report and Order (Released March 21, 2002) (streamlining domestic interstate approval requirements); CPUC Decisions 94-05-051, 96-02-004, 98-07-094, 04-10-038 (California Commission applying streamlined advice letter procedures to routine transaction of competitive carriers); Administrative Case No. 370, Exemptions for Providers of Local Exchange Carriers (Kentucky Public Service Commission January 8, 1998); Administrative Case No. 359, Exemptions for Interexchange Carriers, Long Distance Resellers, Operator Service Providers and Customer-Owned, Coin Operated Telephones (Kentucky Public Service Commission June 21, 1996) (Exempting competitive carriers from transfer and financing requirements).

carrier is financially stable. From the consumer's perspective, adequate service at reasonable rates remains available by virtue of the freedom to choose among multiple providers.

A. Arizona's Transfer and Financing Approval Process

In Arizona, a Class A certificated carrier, such as Level 3, that seeks to complete a transfer transaction is typically subject to the Affiliated Interests Rules (AAC R14-2-801 *et seq.*) and possibly A.R.S. § 40-285 and must obtain Commission approval prior to consummating the transaction.[2] Similarly, certificated carriers are required to obtain prior Commission approval in order to complete a stock or debt financing.[3] Although the Arizona statutes and the Affiliated Interests Rules outline the general authorization for Commission oversight of these types of transactions, the statutes and Commission regulations also allow the Commission to waive these requirements in certain situations, which is appropriate following the advent of competition. As such, through these waiver provisions, the Commission retains the discretion to determine the administrative process by which it exercises oversight authority over business transactions.

The approval process over these types of transactions typically requires parties to prepare and file an application describing the transaction, including detailed financial information, a description of new management and owners (in the case of a transfer) and a description of the financing arrangement (in the case of stock or debt financing). Each application must describe the public interest reasons why the application should be granted. Commission staff then reviews the filing for completeness and prepares written data requests seeking additional information on a case-by-case basis regarding the extent of in-state operations, financial information, or seeking other information determined to be

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2 Transfers of control include sales of majority stock interests or other cognizable controlling interests, mergers, *pro forma* changes, reorganizations and sales of substantially all assets.

relevant by staff. In response to these inquiries, the parties must gather the requested information and respond in writing. Although parties may intervene, it is the rare exception that comments are submitted with respect to any non-dominant carrier application. After these steps are completed, and in some instances following a hearing, Commission staff or the Hearing Division, will prepare its recommendations to the Commission for ultimate disposition. Once this process is complete, the case is then placed on an agenda for the next scheduled Commission Open Meeting. Following the Commission's ruling at the Open Meeting and signature of the order by all Commissioners, the Commission's decision becomes effective.

Typically, the process from filing to effective Commission approval requires four to six months. It is not uncommon for administrative processing times to stretch beyond six months. These longer processing times are usually not caused by the need for additional review of substantive issues raised by the request but as a result of increased Commission staff workloads. In an era of real-time transactions, the process for securing these regulatory approvals represents an untenable delay. In Arizona, carriers that are pressed by important commercial needs have limited procedural means to provide needed certainty to parties in the transaction. This process is particularly burdensome on multi-state transactions. Even when the Federal Communications Commission and, in some cases, the United States Department of Justice, and other states that have implemented streamlined measures have already approved the transaction, carriers such as Level 3 must await the completion of the Arizona administrative process to complete their transaction.

B. The Approval Process Harms Non-dominant Competitive Carriers, Their Customers, Vendors and Employees

Non-dominant carriers today are motivated by robust competition for customers and financing to complete corporate acquisition and financing transactions quickly – often

[3] Financing transactions include issuances of stock, issuances of securities, loans, guarantees, pledges and encumbrances on the carrier's property. Those transactions may require approval under the Affiliated Interest Rules,

in just a few weeks time. However, non-dominant carriers remain constrained by legacy pre-approval requirements and thus cannot react quickly to rapidly changing market demands to meet their business needs. During the period during which a carrier's application is pending, the non-dominant provider is forced to put on hold the completion of consolidations, corporate changes, or financing arrangements.

The simple reality is that these delays expose businesses to substantial and unnecessary risks in the marketplace. Delays of a few months put at risk the successful closing of transfer and financing transactions. Rapid changes in market conditions during the regulatory-enforced delay can increase the cost of the transaction or even result in market changes that foreclose successful completion. While parties await approval, they are exposed to economic risks of delay including lost revenue and synergies, customer defections, impaired service, or even the collapse of the transaction. Failure to close a transaction has real-world adverse consequences for the employees, vendors, customers and shareholders of competitive carriers. The uncertainties of the regulatory process are amplified by the fact that Arizona's statutes and regulations provide that failure to obtain the required approvals may result in the entire transaction being deemed void. *See* AAC R14-2-804; A.R.S. §§ 40-285; 40-303.

III. Level 3 Requests a Waiver that Would Streamline the Filing Process for Transfer and Financing Transactions

Level 3 recognizes that it is important to preserve the Commission's ability to regulate carriers certified to provide intrastate services including to monitor transfers and financing transactions. However, in light of the dramatic changes to the telecommunications market that have occurred, all parties – the Commission, regulated carriers, their vendors, employees and consumers of telecommunications services in Arizona – would benefit by streamlining the approval procedures that apply to non-

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A.R.S. § 40-285, and/or A.R.S. §§ 40-301 to -303.

dominant carriers in transfer and financing transactions to make them aligned with the streamlined administrative approval procedures of the FCC.

Most carriers operating in multiple jurisdictions also hold authority from the FCC under Section 214 of the Communications Act of 1934, as amended, to operate as interstate common carriers. Under federal rules, such interstate carriers are required to obtain prior approval to transfer control. However, the FCC has reformed its processes and rules to eliminate unnecessary delays and burdens on competitive carriers and applies streamlined approval processing procedures to the transfer transactions of a vast majority of non-dominant competitive interstate carriers.[4] Specifically, FCC rules provide that applications for approval subject to streamlined treatment are deemed granted within 31 days of publication of the filing (unless otherwise notified by the Commission).[5] In the event a transaction does not qualify for streamlining (based on, for instance, the dominant position of the carriers in the transaction), the FCC attempts to complete its review of those transactions within six months. The FCC does not impose <u>any</u> regulatory requirements or process on interstate carrier financing transactions.

For these reasons, Level 3 requests that the Commission grant it a limited waiver that would require that Level 3 do the following in relation to any business transaction that would fall within the requirements of the Affiliated Interests Rules (AAC R14-2-801 *et seq.*), A.R.S. § 40-285 and/or A.R.S.§§ 40-301 to -303:

1. At least ten days prior to the transaction, Level 3 must file a notice ("Notice") of the transaction with the Commission.
2. The Notice must contain certain basic information about the carrier, its operations and the transaction at issue.
3. The Notice shall be deemed effective approval of the transaction under the applicable Arizona statutes and regulations upon filing.

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[4] Implementation for Further Streamlining Measures for Domestic Section 214 Authorizations, CC Docket No. 01-150, Report and Order FCC 02-78 (Released March 21, 2002).

[5] Id. at para. 26; 47 C.F.R. § 63.03 (a).

4. The Commission would retain jurisdiction over Level 3 and the transaction post-closing to make inquiries, and, if necessary, to take action to protect consumer interests, commence proceedings, and/or impose conditions on Level 3's certificate, including necessary reporting requirements.

IV. Conclusion

Level 3 hereby respectfully petitions the Commission for a limited waiver to allow for streamlined administrative approval process in the manner set forth above for transfer and/or financing transactions governed by the Affiliated Interests Rules (AAC R14-2-801 *et seq.*), A.R.S. § 40-285, and/or A.R.S. §§ 40-301 to -303.

RESPECTFULLY SUBMITTED this 30th day of May, 2006.

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ORIGINAL AND thirteen (13) copies
of the foregoing hand-delivered
this 30th day of May, 2006, to:

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COPY of the foregoing hand-delivered this 30th day of May, 2006, to:

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